In the matter of Tan Eng Seng Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D1–28–283 OF 1997
VINCENT NG J
17 NOVEMBER 2002

Companies and Corporation — *Winding up — Costs of petition — Whether costs to be paid out of company's assets — Contributories the only opposition to petition — Test of good faith — Whether costs to be borne by contributories — Principle of fairness*

An order for the winding up of Tan Eng Seng Holdings Sdn Bhd ('the Company') was granted after the contributories, who had given notice of their intention to oppose the petition withdrew their opposition to the petitioners' petition to wind up the Company. The issue in this case was who should pay the petitioners, the costs incurred in the winding up petition.

Held:

(1) To order that the petitioners' costs in the winding up petition be paid out of the Company's assets, in accordance with the general rule, would be an injustice, as such costs would eventually be passed on indirectly to the petitioners themselves. In other words, if the Company were to pay the petitioners' costs, although it was only the contributories that opposed the petition, 60% of such costs would eventually be borne by the petitioners and the supporting creditors. The principle of fairness dictates that a shareholder or a group of shareholders who unsuccessfully challenged a winding up petition, should not pass on the costs of such unsuccessful challenge to the Company (see pp 238H–239B).

(2) The contributories failed the test of 'good faith'. It could not be denied that it was in fact, their unreasonable conduct that led to the protracted winding up proceedings. Having recognized that the ends of justice would be met if the Company was wound up and each party allowed to go on their separate ways, albeit three and a half years down the road and after several interlocutory applications and appeals to the Court of Appeal, the contributories took up their swords again to oppose the petition, this time in a frivolous objection (see p 239F–G).

(3) This whole exercise, which in total expended over a period of nearly four years and ten months, had involved the parties, not the least of which the Company, incurring expenses running into the millions. And why, if not solely the contributories' stubborn refusal to accept the reality of the situation and concede that the just and equitable remedy was for the company to be wound up (see p 239G–H).

(4) In the circumstances, after having carefully considered the particular facts of this case, the court was entirely satisfied that it was just and proper to make an order that the petitioners' costs prayed be taxed on a solicitor-client basis and be borne by the contributories (see pp 239I–240A).

[Bahasa Malaysia summary

Satu perintah untuk penggulungan Tan Eng Seng Holdings Sdn Bhd ('Syarikat tersebut') telah dibenarkan setelah penyumbang-penyumbang, yang telah memberikan notis niat mereka untuk membangkang petisyen telah menarik balik bantahan terhadap petisyen pempetisyen-pempetisyen untuk menggulung Syarikat tersebut. Persoalan dalam kes ini adalah siapa yang patut membayar pempetisyen-pempetisyen tersebut, kos yang dikenakan dalam petisyen penggulungan.

Diputuskan:

(1) Untuk memerintahkan kos pempetisyen-pempetisyen dalam petisyen penggulungan dibayar daripada aset-aset Syarikat tersebut, menurut peraturan am, adalah tidak adil, kerana kos sedemikian akan akhirnya ditanggung oleh pempetisyen-pempetisyen sendiri secara tidak langsung. Dalam erti kata lain, jika Syarikat tersebut perlu membayar kos pempetisyen-pempetisyen, walaupun ia hanyalah penyumbang-penyumbang yang membangkang petisyen tersebut, 60% daripada kos tersebut akhirnya akan ditanggung oleh pempetisyen-pempetisyen dan pemiutang-pemiutang yang menyokong. Prinsip keadilan menyatakan bahawa seorang pemegang saham atau satu kumpulan pemegang-pemegang saham yang tidak berjaya mencabar satu petisyen penggulungan, tidak sepatutnya menyerahkan kos yang gagal dicabar tersebut kepada Syarikat tersebut (lihat ms 238H–239B).

(2) Penyumbang-penyumbang telah gagal ujian 'good faith'. Ia tidak boleh dinafikan bahawa pada hakikatnya, perbuatan mereka yang tidak munasabah yang telah menyebabkan prosiding penggulungan berlarutan. Setelah menyedari bahawa keadilan dilaksanakan jika Syarikat tersebut digulungkan dan setiap pihak dibenarkan membuat haluan masing-masing, walaupun tiga tahun setengah telah berlalu dan selepas beberapa permohonan interlokutori dan rayuan ke Mahkamah Rayuan, penyumbang-penyumbang telah membangkang petisyen tersebut semula. Kali ini ia satu bantahan yang remeh (lihat ms 239F–G).

(3) Keseluruhan latihan ini, yang keseluruhannya berlanjutan selama satu tempoh hampir empat tahun sepuluh bulan, telah melibatkan pihak-pihak, yang tidak kurangnya Syarikat tersebut, dikenakan bayaran berjuta-juta ringgit. Dan kenapa, jika bukan kerana

keengganan penyumbang-penyumbang yang keras kepala untuk menerima kenyataan tentang keadaan dan mengakui bahawa remedi yang adil dan saksama adalah untuk Syarikat tersebut digulungkan (lihat ms 239G–H).

(4) Dalam keadaan berikut, setelah menimbangkan dengan teliti fakta-fakta yang tertentu dalam kes ini, mahkamah berpuas hati keseluruhannya bahawa ia adalah adil dan betul untuk membuat satu perintah di mana kos pempetisyen-pempetisyen yang dipohon dikenakan cukai berdasarkan hubungan peguamcara-anakguam dan ditanggung oleh penyumbang-penyumbang (lihat ms 239I–240A).]

Notes

For cases on costs of petition, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 778–779.

Cases referred to

A & BC Chewing Gum Ltd, Re [1975] 1 WLR 579 (refd)
Bathampton Properties Ltd, Re [1976] 1 WLR 168 (refd)
Datacom Cable Systems Co Ltd, Re [2001] 2 HKC 482 (refd)
North End Motels (Huntly) Ltd, Re [1976] 1 NZLR 446 (refd)
Sarator Properties & Investments Ltd, Re [2002] HKCU Lexis 6 (refd)

Legislation referred to

Companies Act 1965 ss 220, 351(2)
Courts of Judicature Act 1964 25(2), Schedule, item 15

Isabella De Silva (*HY Chong* with her) (*Azman, Davidson & Co*) for the petitioner.

Conrad Young (*Sivananthan*) for the supporting contributories.

Shirlena Yogeswaran (*Lee Hishammuddin*) for the opposing contributories.

Vincent Ng J: On 6 May 2002, an order for the winding up of Tan Eng Seng Holdings Sdn Bhd (Company) was granted after Tan Toh Hua, Tan Chor Sim, Tan Chor Teck, Tan Chor Jin, Tan Lay Tin and Tan Siew Cheng, the contributories, who had given notice of their intention to oppose the petition (collectively, OC), withdrew their opposition to the petitioners' petition to wind up the Company.

This left only the issue of who should pay the petitioners, the cost incurred in the winding up petition. It is noteworthy that the petitioners were only seeking costs arising from or incidental to the petition proper, such as the petition itself; the costs and expenses incurred for complying

with the requirements of the winding up rules; the affidavit in opposition and any other affidavits relating thereto; getting up in relation to the petition and the attendance in court for the hearing of the petition.

Power of the court to grant costs

In the case of winding up proceedings, the general rule as to the courts' power to grant costs is provided under s 220 of the Companies Act 1965 ('the Act') which prescribes:

> (1) The persons ... on whose petition any winding order is made shall at their own costs prosecute all proceedings in the winding up until a liquidator is appointed.
>
> (2) The liquidator shall, unless the court orders otherwise, reimburse the petitioner *out of the assets of the Company* taxed costs incurred by the petitioner in such proceedings. (Emphasis added.)

The court also has a further power to award costs under s 351(2) of the Act which provides that:

> The costs of any proceedings before a court under this Act shall be borne by *such party to the proceedings as the court may, in the discretion, direct.* (Emphasis added.)

In the case of winding up proceedings, 'such party to the proceedings' would include a person who has given notice of his intention to appear and oppose the petition.

Section 25(2) of the Courts of Judicature Act 1964 ('the CJA'), read together with item 15 of the Schedule to the CJA, gives a High Court the additional power to award costs.

It is clear that sub-s 2 of s 351of the Act referred to above, are enabling provisions for the departure from the general rule in the court awarding costs in winding up proceedings.

Background history

In order to ensure a proper exercise of the discretion in making the order as to costs in this winding up proceedings, it is necessary to review the tempestuous history of these proceedings, especially to note the conduct of the parties and to appreciate the time frame involved. Briefly, the history is as follows.

On 22 July 1997, the petitioners presented a petition to wind up the Company. The petition was duly fixed for hearing on 26 September 1997. Shortly after the presentation of the petition, the petitioners sought and obtained an ex parte order for the appointment of two provisional liquidators ('PL').

Tan Toh Hua, Tan Lay Tin and Tan Poh Tin ('Tans'), who were directors of the Company then in control of the board, caused the Company

A to challenge the appointment of the PL and to oppose the petition. The Tans, in their individual capacities as contributories, not only gave notice of their intention to oppose the winding up petition, but also, together with the other OC challenged the appointment of the PL.

The challenge to the appointment of the PL was done in the following
B manner:

(1) On 8 August 1997, the OC made an oral application for a stay of the said appointment order. This was duly dismissed by this court.

(2) The matter was then taken up to the Court of Appeal by way of a motion, which was fixed for hearing on 21 August 1997. Pending the
C hearing of that application, the Company and OC applied unsuccessfully for an interim stay of the same order on 15 August 1997. The substantive application was also dismissed by the Court of Appeal.

(3) Having lost the battle, the Company and OC continued to wage war
D by taking out an application to set aside the appointment of the PL. On 5 November 1997, this court dismissed the application.

(4) The OC being dissatisfied with this decision, filed their second appeal to the Court of Appeal. Their appeal was dismissed by the court on 20 March 1998.

E As a direct result of the challenge by the Company and OC being taken up at different levels, the hearing of the winding up petition was inevitably delayed.

In the meantime, the persistent OC made further applications for an order to cross-examine the second petitioner and for an order for extension
F of time to file their affidavit in opposition to the petition. The petitioners graciously consented to the second application, no doubt with the fervent hope that this would in turn speed up the hearing of their petition. The petition was then fixed for hearing on 31 July 1998.

The petitioners, in turn, sought and obtained an injunction on 5 November 1997 against the Tans, preventing them, as directors, from
G causing the Company to continue to oppose the winding up petition.

The rationale for the injunction was essentially that since the petition concerned a dispute between two groups of shareholders, the Company itself ought not take sides and its funds should not be utilized to oppose the petition, in support of one group against the other. By causing the Company
H to do so, the Tans were in breach of their fiduciary duty as this amounted to the misuse of the Company's funds.

As a consequence of the injunction granted by this court, from this point on the Company no longer played a role in the winding up proceedings.

I Needless to say, this injunctive order resulted in the Tans taking up another appeal to the Court of Appeal. Although their appeal was eventually dismissed, the hearing of the winding up petition was further delayed as the

dissatisfied Tans had also applied for a stay of the proceedings pending the hearing of the said appeal. A

Throughout these proceedings, the petitioners always maintained that there had been a complete and irretrievable breakdown in trust and confidence between the two warring groups of shareholders. It was for this reason that it would be just and equitable to wind up the Company. This fact, sadly, seemed obvious to all except the OC. B

After a period of nearly three and a half years, the reality of the situation finally dawned on the OC, and they indicated that they no longer wished to oppose the winding up petition. This 'realization' however was short lived and the saga continued. C

It was when the petitioners made an application to amend the petition to change their nominations of the persons to be liquidators, that the capricious OC decided not only to oppose the application but to renew their opposition to the petition. Having failed to stop the petitioners' amendment, they appealed to the Court of Appeal for the third time, whilst simultaneously seeking to stay the winding up pending their appeal. D

The OC finally agreed to the nominees from Pricewaterhouse Coopers to being the liquidators of the Company, although they were, in no way in a better position, in terms of knowledge of the Company's affairs, than the nominees from Arthur Anderson, proposed by the petitioners. E

The unreasonable conduct of the OC was evident, in that ironically, although their opposition to the amendment was apparently based on their fear that the appointment would have the effect of dissipating the Company's already fast depleting assets, their very own application for stay, inevitably prolonged the appointment of the PL and thus further escalating the costs incurred by the Company. F

This appeal was subsequently withdrawn but not before causing more delays in the hearing of the petition. Having caused so much chaos, the OC finally withdrew their opposition to the winding up petition.

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Who should pay the costs?

It is clear and undenied that the dispute that brought about the presentation of the winding up petition in this case, was one between two groups of shareholders; the petitioners and two supporting contributories holding 60% of the Company's total issued capital on one side and the OC holding 35% on the other. H

The Company had no role to play in this dispute, which is why the OC were injuncted from causing it to oppose the petition.

Firstly, to order that the petitioners' costs in the winding up petition be paid out of the Company's assets, in accordance with the general rule, would be an injustice, as such costs would eventually be passed on indirectly to the petitioners themselves. I

A In other words, if the Company were to pay the petitioners' costs, although it was only the OC who opposed the petition, 60% of such costs would eventually be borne by the petitioners and the supporting creditors.

The principle of fairness dictates that a shareholder or a group of
B shareholders who unsuccessfully challenged a winding up petition, should not pass on the costs of such unsuccessful challenge to the Company.

In *Re Bathampton Properties Ltd* [1976] 1 WLR 168 at p 171, Brightman J (as he then was) held:

C > ... there would seem to be a great injustice in permitting the beneficial owner of all the shares in a company to oppose a winding up petition in order to seek to secure a benefit for himself as a shareholder and then, having failed in his opposition, to charge the costs of such unsuccessful opposition to the creditors of the company.

D (See also *Re A & BC Chewing Gum Ltd* [1975] 1 WLR 579, *Re North End Motels (Huntly) Ltd* [1976] 1 NZLR 446, *Re Datacom Cable Systems Co Ltd* [2001] 2 HKC 482 and *Re Sarator Properties & Investments Ltd* [2002] HKCU Lexis 6.)

Lord Brightman reiterated this view in *Malayan Credit Ltd v Jack Chai-MPH Ltd* [1986] 1 MLJ 445 at p 449:

E > The Court of Appeal ordered that the costs of all parties should be paid out of the proceeds of sale of the property. Their Lordship respectfully doubt whether that was an appropriate order to be made in hostile litigation such as the present, since *the effect would be to throw on the winning side (then the plaintiff), one half of the costs of the losing side.* (Emphasis added.)

F Secondly, the OC failed the test of 'good faith'. It cannot be denied that it was in fact, their unreasonable conduct that led to the protracted winding up proceedings. Having recognized that the ends of justice would be met if the Company was wound up and each party allowed to go on their separate ways, albeit three and a half years down the road and after several
G interlocutory applications and appeals to the Court of Appeal, the OC took up their swords again to oppose the petition. This time in a frivolous objection to the petitioners' application to amend the nomination of persons to be liquidators and an equally frivolous appeal thereafter.

Thirdly, this whole exercise, which in total expended over a period of nearly four years and ten months, had involved the parties, not the least of
H which the Company, incurring expenses running into the millions. And why, if not solely the OC's stubborn refusal to accept the reality of the situation and concede that the just and equitable remedy was for the company to be wound up.

I *Conclusion*

In the circumstances, after having carefully considered the particular facts of this case, I am entirely satisfied that it is just and proper to, which I now

do make an order that the petitioners' costs prayed for in relation to the winding up petition as restated in para 2 of the preamble above, be taxed on a solicitor-client basis and be borne by the OC. A

Order accordingly.

Reported by Peter Ling B

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